

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

1. DONALD MILLS)	
)	
Plaintiff,)	
)	
v.)	Case No. 11-cv-599-GKF-FHM
)	
1. BNSF RAILWAY,)	
2. BURLINGTON NORTHERN AND)	
SANTA FE RAILWAY,)	
3. BURLINGTON NORTHERN SANTA)	
FE CORPORATION,)	
4. BNSF RAILWAY COMPANY,)	
5. BURLINGTON NORTHERN SANTA)	
FE, LLC,)	
6. BURLINGTON NORTHERN INC.,)	
7. THE STAUBACH COMPANY,)	
8. HOLLOWAY-STAUBACH)	
CORPORATION and)	
9. JONES LANG LaSALLE,)	
)	
Defendants.)	

BNSF’S RESPONSE TO PLAINTIFF’S TENTH MOTION IN LIMINE

COMES NOW Defendant, BNSF Railway Company (“BNSF”), by and through its counsel of record, Gibbs, Armstrong, Borochoff, Mullican and Hart, P.C. and for its response to Plaintiff’s Tenth Motion in Limine [Dkt No. 100] states as follows:

Although far from clear, Plaintiff’s Tenth Motion in Limine seemingly asks the Court to preclude new testimony, evidence, or opinions not previously disclosed, identified or testified to by defendant through Rule 30(b)(6) depositions of designated corporate representatives. As this Court is well aware, it should reserve its rulings on a motion in limine for those instances when the evidence plainly is “inadmissible on all potential grounds,” *Townsend v. Benya*, 287 F.Supp.2d 868, 872 (N.D. Ill. 2003), and a court should typically defer rulings on relevancy and unfair prejudice objections until trial when the factual context is developed, *see Sperberg v. Goodyear Tire & Rubber Co.*,

519 F.2d 708, 712 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975). Here, Plaintiff seeks an order which prevents BNSF from contradicting its Rule 30(b)(6) witnesses testimony which is not the proper office of a motion in limine.

More importantly, Plaintiff discloses why the Court should deny his Tenth Motion in Limine—the existence of Northern District of Oklahoma precedent that is directly adverse to his position. *Butterfly-Biles v. State Farm Life Ins. Co.*, 09-CV-086-CVE-PJC, 2010 WL 346838 (N.D. Okla. Jan. 21, 2010). In *Butterfly-Biles*, the court held:

it is well-settled that although a company is bound by its 30(b)(6) witness's testimony, that testimony does not constitute a judicial admission that "formally and finally decides an issue." *W.R. Grace & Co. v. Viskase Corporation*, 1991 WL 211647, *2 (N.D. Ill.). "The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes." *Industrial Hard Chrome, Ltd. v. Hetran Inc.*, 92 F.Supp.2d 786, 791 (N.D. Ill. 2000). If State Farm takes a contrary position to that espoused by its Rule 30(b)(6) witness, Plaintiff can impeach State Farm with Boden's testimony.

Butterfly-Biles, 2010 WL 346838 at *2.

The Court should deny Plaintiff's tenth motion in limine, because he has not shown the exact testimony from BNSF that would be plainly inadmissible on all possible grounds. Additionally, there is no cited reason to depart from the holding in *Butterfly-Biles*, nor any compelling authority that would direct the Court to do so.

WHEREFORE, PREMISES CONSIDERED, BNSF Railway Company respectfully requests the Court to deny Plaintiff's Tenth Motion in Limine regarding new testimony, evidence, or opinions not previously disclosed, identified or testified to by defendant through Rule 30(b)(6) depositions of designated corporate representatives.

Respectfully submitted,

/s/George R. Mullican

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of May 2013, a true and correct copy of the foregoing was electronically transmitted to the Clerk of the Court of the Northern District of Oklahoma using the ECF system for filing to the following ECF registrants:

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